IN THE COURT OF APPEALS OF IOWA

No. 3-1023 / 13-0665
Filed January 9, 2014

GITS MANUFACTURING COMPANY AND
ST. PAUL TRAVELERS INSURANCE COMPANY,
Plaintiffs-Appellants/Cross-Appellees,

vs.

DEBORAH FRANK,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

An employer appeals and an employee cross-appeals the district court's decision on judicial review from a workers' compensation decision. **REVERSED AND REMANDED.**

Jay D. Grimes and William D. Scherle of Hansen, McClintock & Riley, Des Moines, for appellants.

D. Brian Scieszinski of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee.

Heard by Vogel, P.J., and Mullins and McDonald, JJ.

VOGEL, P.J.

Gits Manufacturing and St. Paul Travelers Insurance (the employer) appeal from the district court's judicial review decision, which affirmed the award of permanent total disability benefits to Deborah Frank. The employer asserts Frank failed to meet her burden of production when she failed to offer evidence of her efforts to find employment or other evidence of her inability to work. In addition, the employer asserts Frank did not provide evidence to prove she repaid long-term disability benefits after she was awarded social security disability. The employer asserts it was error for the district court to affirm the agency's decision on these grounds. Frank cross-appeals the district court's judicial review decision, asserting the court erred in reversing and remanding the case to the agency on the issue of the amount of the employer's credit for disability benefits paid. Frank asserts the employer did not properly preserve error for this claim and substantial evidence supports the agency's decision on this point.

We conclude the district court incorrectly ruled substantial evidence supports the agency's award of permanent total disability benefits. We reverse the district court on this issue and remand to the agency for a determination of Frank's industrial disability based on the current record. We conclude the employer did not preserve error on its claim Frank failed to offer adequate evidence of the amount of money she repaid to the long-term disability carrier as a result of being awarded social security disability. We also conclude the employer did not preserve error on the issue of the amount of credit it was entitled to for the disability benefits that were paid to Frank. We reverse the

district court's decision on these issues and remand the case to the district court to enter an order affirming the agency's decision in this case on these grounds.

I. BACKGROUND FACTS AND PROCEEDINGS.

Frank sought workers' compensation benefits for a cumulative trauma lung injury arising from her work as a welder at Gits Manufacturing. She filed a petition and was granted benefits in March 2007. That decision was appealed and affirmed by this court in May 2010. *See Frank v. Gits Mfg.*, No. 09-1419, 2010 WL 2079689, at *1 (Iowa Ct. App. May 26, 2010). Because it was determined Frank was not yet at maximum medical improvement at the time of the first arbitration hearing, Frank filed a second petition in the workers' compensation commission seeking an evaluation of the extent of her disability in April 2009. The second petition proceeded to a hearing on May 5, 2011, and the deputy commissioner issued an arbitration decision on July 29, 2011.

The deputy found Frank to be permanently and totally disabled under the odd-lot doctrine. According to the deputy, Frank's work history did not provide her with the skills to reenter the job market as a sedentary worker, and there was not sufficient evidence that Frank could successfully complete job retraining at her age and with her physical condition. With respect to the benefits owed to Frank, the deputy adopted the credit calculations submitted by Frank, which purported to show the amount of long-term disability benefits received each calendar year, the amount of tax paid on those benefits, and the amount Frank repaid to the long-term disability carrier upon her receipt of social security disability benefits. The deputy also awarded Frank penalty benefits as a result of

the employer's unjustified two-month delay in payment of benefits following the previous appeal.

The employer appealed the deputy's decision to the commissioner who affirmed and adopted the deputy's decision without additional comment. The employer then sought judicial review from the district court. The court affirmed the agency's permanent total disability finding and its conclusion Frank repaid $7033.33 to the long-term disability carrier after receiving social security disability. However, the court found the evidence Frank submitted to establish the amount of credit the employer was entitled to receive was inconsistent. It therefore reversed the agency's decision on that issue and remanded the case to the agency for a computation of the credit based on the information in the record as to the amount of benefits received and the taxes actually paid on those benefits. Finally, it affirmed the agency's award of penalty benefits.

The employer now appeals challenging the district court's affirmance of the permanent total disability award and its approval Frank's evidence to support the amount of money she paid back to the long-term disability carrier. Frank cross-appeals challenging the district court's decision to reverse and remand for the agency to recalculate the credit the employer is entitled to receive.

II. SCOPE AND STANDARD OF REVIEW.

In an appeal from a petition for judicial review, our task is to apply the Iowa Administrative Procedures Act in Iowa Code section 17A.19(10) (2011) to see if our conclusions are the same as the district court. *City of Davenport v. Newcomb*, 820 N.W.2d 882, 886–87 (Iowa Ct. App. 2012). "If they are the same, we affirm; otherwise we reverse." *Id*. at 887.

The employer in this case cites to the varying standards of review available in judicial review proceedings but fails to articulate precisely what its claim is on appeal and fails to convey the standard of review it seeks under section 17A.19(10). *See Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010) ("Because of the widely varying standards of review [under section 17A.19(10)], it is essential for counsel to search for and pinpoint the precise claim of error on appeal." (internal quotation marks omitted)). However, the focus of the employer's claim is the lack of evidence to support the agency's odd-lot assessment. We will therefore review this claim under Iowa Code section 17A.19(10)(f). We will review the agency's factual findings to see if they are supported by substantial evidence in the record when the record is viewed as a whole. Iowa Code § 17A.19(10)(f). Likewise, the employer's claim that the agency committed error when it concluded Frank repaid $7033.33 to the long-term disability carrier is an attack on the factual findings of the agency, and we will review the same for substantial evidence.

Finally, Frank's cross-appeal claim—the district court incorrectly concluded the evidence did not support the agency's decision on the amount of the credit the employer is entitled to receive—is again focused on the factual findings of the agency. This will be reviewed under section 17A.19(10)(f).

Substantial evidence is defined to mean "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." *Id.* § 17A.19(10)(f)(1). "Evidence is not insubstantial merely because different

conclusions may be drawn from the evidence." *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011). "'The burden on the party who was unsuccessful before the commissioner is not satisfied by a showing that the decision was debatable, or even that a preponderance of evidence supports a contrary view.'" *Mercy Med. Ctr. v. Healy*, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011) (quoting *Midwest Ambulance Serv. v. Ruud*, 754 N.W.2d 860, 865 (Iowa 2008)). A substantial evidence review of the agency's factual findings is limited to the findings actually made by the agency, not other findings that the agency could have made. *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012).

III. ODD-LOT PERMANENT TOTAL DISABILITY.

Iowa formally adopted the odd-lot doctrine in *Guyton v. Irving Jensen Co*., 373 N.W.2d 101, 105 (Iowa 1985). A worker is entitled to permanent total disability benefits under this doctrine when "an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market." *Guyton*, 373 N.W.2d at 105. There is a shifting burden of production in odd-lot cases. *Second Injury Fund v. Nelson*, 544 N.W.2d 258, 267 (Iowa 1995). The worker must first establish a prima facie case of total disability "by producing substantial evidence that the worker is not employable in the competitive labor market." *Guyton*, 373 N.W.2d at 106. "'Prima facie' has been defined as "'at first view' or 'on its face' or 'without more.'" *Iowa City v. Nolan*, 239 N.W.2d 102, 105 (Iowa 1976). "A prima facie case is that which is received or continues until the contrary is shown, and one which in the absence of explanation or contradiction constitutes an apparent case sufficient in the eyes of the law to establish the fact, and if not rebutted, remains sufficient for that purpose." *In re Estate of Hoagland*,

253 N.W. 416, 419-20 (Neb. 1934) (citing *Gilmore v. Modern Bhd. of Am.*, 171 S. W. 629 (Mo. Ct. App. 1914)).

The prima facie case under the odd-lot doctrine can be established through evidence of the degree of the worker's physical impairment "coupled with other facts such as the claimant's mental capacity, education, training, or age." *Guyton*, 373 N.W.2d. at 105. If a prima facie case is established, the burden of production shifts to the employer to "show that some kind of suitable work is regularly and continuously available to the [worker]." *Id.* However the ultimate burden of persuasion always remains with the worker. *Id.*

The employer's objection to the award in this case centers on whether Frank came forward with enough evidence to establish a prima facie case for the application of the odd-lot doctrine. The employer asserts Frank failed to put forth any evidence of any effort to seek employment and did not offer other evidence of her inability to be employed.

In *Guyton*, the supreme court stated,

> It is normally incumbent upon an injured [worker], at a hearing to determine loss of earning capacity, to demonstrate a reasonable effort to secure employment in the area of . . . residence. Where testimony discloses that a reasonable effort was made, the burden of going forward with evidence to show the availability of suitable employment is on the employer and carrier.

Id. The employer here points to the testimony of Frank where she admitted she had not looked for work in the four years since her employment with the employer ended. This requirement to offer evidence of an employment search was tempered in *Nelson*: "[S]uch proof [of a job search] is not an absolute prerequisite if the employee introduces other substantial evidence that he has no

reasonable prospect of steady employment." 544 N.W.2d at 267. The court went on to explain that it would not require "clearly unemployable claimants to go through the futile exercise of searching for nonexistent employment." *Id.* Other evidence, beside proof of a job search, that is important to determining if someone falls into the odd-lot category is "the [worker's] physical impairment, intelligence, education, training, ability to be retrained, and age." *Id.* at 268.

> [I]t is not necessary that the employee's evidence be so strong as to compel a finding that he is an odd-lot employee as a matter of law; it is merely necessary that he generate a fact question on this issue, through the introduction of substantial evidence, to establish a prima facie case.

Id.

The employer claims Frank's evidence falls far short of a prima facie showing of being an odd-lot employee. Besides Frank's "self-serving" and self-contradicting testimony, the employer claims Frank offered no evidence of her inability to work or her inability to be retrained. The employer claims the evidence it submitted through its vocational rehabilitation expert, Susan McBroom, clearly establishes Frank can be retrained and can work in the sedentary work category.

The agency noted the medical evidence in this case showed Frank cannot work in environments "that contain smoke, dust, fumes or vapors." "[H]er lung function has been severely and permanently impaired resulting in approximately 50% loss of breathing function which prevents her from performing any strenuous work." However, the employer asserts by Frank's own testimony she is able to work around her farm in a dusty environment without any protective mask.

The employer offered the report and live testimony of McBroom. After reviewing medical records and interviewing Frank, McBroom placed Frank in the sedentary physical demand job category. Frank was 54 years old and had a high school diploma but no further education. Frank's work history consisted of her job at Gits Manufacturing since 1997. Prior to 1997, she stayed home with her children. In the 1970s, Frank worked as a nurse's aide for a year or two. McBroom came up with a list of secretarial or reception jobs that would work within Frank's physical restrictions, but McBroom noted "Frank will have to take some additional training to be considered for these clerical positions." McBroom also listed a number of classes that were available at the community college to obtain the additional training Frank would need.

Frank admitted that no doctor has told her that she should not apply for suitable work. She knew of no reason why she could not learn additional computer skills or be retrained. She also confirmed that she has no restrictions on her ability to drive. Contrary to her claim that some days she is barely able to get out of bed or off the couch, Frank admitted she tends to her goats on a daily basis. She lives on a farm where she is exposed to dust from the gravel road, , pollen when she mows and gardens, household dust, and animal dander. In spite of these threats to her lung function, she does not wear a mask or other protective device when doing her chores. Frank also stated in her deposition that assuming she had the retraining, there was no reason she could not perform a sedentary office job such as a receptionist.

The agency conceded that Frank "does not appear motivated to return to work. She has not applied for positions or engaged in any employment search.

Based on the payment [Frank] is receiving from Social Security disability and long-term disability, [Frank] has little incentive to return to work." Despite these strong findings, the agency determined Frank's work history did not provide her with the skills to reenter the job market as a sedentary worker and there was not sufficient evidence Frank could successfully complete job retraining at her age and with her physical condition. There was no evidence in the record from which the agency could find Frank could not complete retraining. *See Hill v. Fleetguard*, *Inc.*, 705 N.W.2d 665, 671–72 (finding two factual statements by the commissioner were not supported by substantial evidence but ultimately finding those errors did not prejudice the worker's substantial rights). Even Frank thought she could be retrained or could learn additional computer skills.

While noting Frank did work around her house and took care of her goats, the agency found, "Working around one's home, setting one's own schedule, and determining one's own fitness for tasks is quite different than working a full-time schedule as an employee of some business." There is no support in the record for this assertion, which forms the basis of the agency's conclusion that Frank is permanently and totally disabled. Frank testified she could not work forty hours per week because of her lack of energy and would have to call in sick to work one to two days per week on a regular basis. However, all that is required is that the worker be able to be "gainfully employed," not that an injured claimant work forty hours per week on a regular basis. *Myers v. F.C.A. Servs., Inc.*, 592 N.W.2d 354, 356 (Iowa 1999) ("The focus is not solely on what the worker can or cannot do; industrial disability rests on the ability of the worker to be gainfully employed."). Frank's testimony is self-contradictory when she states she cannot

get out of bed or off the couch one or two days a week, but yet she tends to her goats daily and performs other household, as well as outdoor chores.

It is the agency that is the trier of fact, and it must weigh the evidence and measure the credibility of witnesses. *Pease*, 807 N.W.2d at 845. However, the only evidence to support the agency's conclusion that Frank met her burden of production to provide a prima facie case of totally disability is self-contradictory. Frank did not provide any evidence of a job search and even admitted she never attempted to find work. We find her testimony does not satisfy the alternative burden to "introduce[] other substantial evidence that [she] has no reasonable prospect of steady employment." *See Nelson*, 544 N.W.2d at 267. Because Frank's own testimony undermined her claim that she is unemployable, we cannot conclude substantial evidence supports the agency's determination Frank established a prima facie case that she is an odd-lot employee and is permanently and totally disabled. We therefore reverse the district court's decision on this ground and remand to the agency for a determination of Frank's industrial disability on the record currently existing.

IV. CREDIT AMOUNT—ERROR PRESERVATION.

The next two issues deal with the amount of the credit the employer is entitled to take as a result of Frank's receipt of long-term disability benefits from a plan maintained by her employer. First, the employer asserts the agency erred in finding Frank repaid the long-term disability carrier $7033.33 in benefits as a result of her receipt of social security disability benefits. The employer claims Frank failed to provide any evidence of the repayment except her own testimony. The second issue was raised on cross-appeal by Frank as a result of the district

court reversing and remanding the case to the agency for computation of the credit less actual state and federal taxes paid. The district court concluded the evidence Frank had submitted was inconsistent as to the amount of tax paid on the benefits.

Frank asserts on appeal that both issues were not properly preserved for review because the employer failed to raise the issues on intra-agency appeal to the commissioner. Frank asserted at the district court the employer did not preserve error on these claims. While acknowledging the error preservation challenge, the district court did not affirmatively rule on whether the employer preserved error. Instead, it simply ruled on the merits of the claim, affirming the agency's decision on the issue of the $7033.33 repayment and reversing and remanding the agency's decision on the issue of the amount of tax paid by Frank on the benefits received.

It is clear at the arbitration hearing Frank testified to her repayment of $7033.33 to the long-term disability carrier as a result of her receipt of social security disability. She also submitted two exhibits addressing the issue of her payment of taxes. The first was her federal and state tax returns, and the second was a summary computation her attorney prepared to detail the total amount of the taxes paid and the total amount of credit the employer was entitled to receive from 2006 through August 2010. There was no discussion at the hearing as to the amount of taxes paid by Frank. The deputy accepted both the amount of the repayment and the calculation of the taxes paid submitted by Frank, finding the figures in her computation exhibit accurately reflected the amount of credit the employer was entitled to receive.

On intra-agency appeal to the commissioner, the employer's brief contained an extensive discussion attacking the odd-lot finding of the deputy, a claim the employer's vocational evidence should have been given more weight, and a detailed objection to the penalty benefits award. However, the brief contained only the following with regard to the issue of the amount of the employer's credit:

> IV. Defendants Are Entitled to Credit for STD/LTD Disability Benefits Less Only Withholding.
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> In *Waters v. Univ. of Iowa Hosp.* the commissioner held the employer was due a credit for the net, after tax, STD/LTD benefits.

There was no indication to the commissioner that the employer disputed the evidence submitted by Frank as to the amount of long-term disability benefits repaid or the amount of the taxes she claimed to have paid on the disability benefits received. The employer simply requested a credit for the after tax short-term and long-term disability benefits received.[1]

In the commissioner's appeal decision, he listed the claims made by the employer as, "Defendants assert on appeal that the deputy commissioner erred in finding that [Frank] was an odd-lot employee, . . . erred in assessing a penalty for late payment of benefits, and erred as to the allowable credit for short and long-term disability benefits." The commissioner summarily rejected the claims and adopted the deputy's decision as the final agency action in this case.

[1] We note the deputy, in accepting Frank's calculation, did give the employer a credit for short-term and long-term benefits received less the amount of taxes Frank stated she paid. The net credit under the exhibit's calculations was $24,805.91 from 2006 through August 2010. It is unclear on appeal what amount of credit the employer believes is proper under the evidence submitted to the agency.

It was not until the case was before the district court on judicial review that the employer specifically claimed the evidence supporting the $7033.33 repayment figure was insufficient and the amount of tax Frank reported she paid was not consistent with her tax return figures.

Raising an issue for the first time in a petition for judicial review before the district court does not preserve error. *Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Comm'n*, 394 N.W.2d 375, 382 (Iowa 1986). "[W]e have consistently held that a party is precluded from raising issues in the district court that were not raised and litigated before the agency." *Interstate Power Co. v. Iowa State Commerce Comm'n*, 463 N.W.2d 699, 701 (Iowa 1990). The agency was not alerted to, nor was it able to rule on, the employer's claim attacking the sufficiency of the evidence submitted to support the amount Frank repaid the long-term disability carrier or the amount Frank paid in state and federal taxes. Because these issues were not properly preserved, the district court should not have ruled on them, and we reverse the district court's decision on these two issues accordingly. The agency's decision on the amount of credit the employer is entitled to receive is affirmed.

V. CONCLUSION.

Because substantial evidence does not supports the agency's award of permanent total disability benefits based on the odd-lot doctrine, we reverse the district court's judicial review decision on this issue and remand the case to the agency for a determination of Frank's industrial disability based on the existing record. We conclude the employer did not preserve error on its claims regarding the amount of credit it is entitled to receive as a result of Frank's repayment of

long-term disability benefits and the amount of state and federal tax Frank paid on the benefits. We reverse the district court's judicial review decision on these issues and remand the case for the district court to enter an order affirming the agency's decision.

REVERSED AND REMANDED.